New Mexico session with mediators

ADR IN CIVIL COURTS

Seminar for Mediators and Lawyers in New Mexico

June 12, 2008

Topics:

1. The place of ADR in the system of civil justice.

2. The place of court ADR programs in the system of civil justice.

3. Guiding Norms, Sources of Peril, and Keys to "Success" (properly understood).

4. ENE

5. Group Sessions v. Private Caucuses

6. Is Procedural Pluralism an illusion? Evaluation in mediation?

7. Approaches to Impasse

8. Timing

The system of civil justice is a lot bigger than our public judicial institutions.
Among others, it includes hundreds of thousands of lawyers and a host of private service provides.

And ADR has come to play a major role in that larger system of civil justice.

> In fact, knowledgeable commentators believe that
> ADR has penetrated the field so thoroughly that
> anticipation of and preparation for ADR events
> has come to dominate civil litigation practice.
>
> See, e.g., Julie MacFarlane's new book, The New Lawyer: How Settlement Is Transforming the Practice of Law.

Why has that happened?

For the common man or the common company, even for the uncommonly big company that has only a modest-sized dispute:

> We cost too much.
> We take too long.
>
> There is way too much indirection, inefficiency, and friction in our procedures.
>
> Judges and lawyers so dominate the system, and
> so straight-jacket the parties with procedural constraints,
>
> that we alienate all but those with the thickest of skins, or with the deepest of pockets, or with the most thoroughgoing cynicism.

The “alienation” that I am talking about is not just some fuzzy ideological hangover from the 1960's.

Rather, the alienation from us that many people feel is rooted in hard realities:

we preside over an adjudicatory system

that the people do not understand,

in which they don’t participate meaningfully, and

over which they have no power.

Most people come to us only because they have to –
only as the option of last painful resort.

They don’t come because they feel welcome.

And they are not animated by gratitude for services anticipated.

The upshot of all this is that,

to an extent that we probably fail to appreciate,

for a substantial portion of our people,

we have succeeded in marginalizing ourselves.

Permit me to develop these themes by looking at the civil court system from another perspective.

I would like to assess our *civil* courts as service institutions:

Courts are the institutions of government in our democracy that are primarily responsible for
providing peaceful means for resolving disputes and
for giving reality to rights under the law.

How well do the courts meet this service obligation?

The data with which I respond to this question are from federal trial courts –

and it is quite likely that the data would be somewhat different for state trial courts, but I suspect that the essentials of the situation are similar in the two court systems.

● In what percentage of general civil cases do courts provide trials?

Fed courts: less than 2%.

● What percentage of general civil cases are resolved by rulings on motions for summary judgment?

Fed courts: less than 10%

● What percentage of the cases are resolved by rulings on other kinds of contested motions?

Fed courts: less than 5%

● In sum, what is the percentage of general civil cases that are resolved on the merits by the exercise of judicial power after contested proceedings?

Fed courts: less than 20%

What kind of service do the other cases get from the courts?

Some get:

A little case management,

A ruling or two on discovery disputes, or

A ruling on some other kind of non-dispositive motion, and

Some secure default judgments;

[in my court, less than 3% of the cases are terminated by default judgments].

The bottom line is this:

a substantial percentage of general civil cases

leave the court system, at least the federal court system,

without having received any service of significant value from any judge.

Why? Why do so many cases leave the courts before receiving any significant service from the judiciary?

While many factors undoubtedly contribute to this situation,

I suspect that the single biggest element in this equation is the

growing disproportion between

the real economic value of general civil cases and

the transaction costs of the formal adjudicatory process.

What does ADR have to do with all of this?

Given the economic facts of civil litigation life,

I believe that it is only by providing high quality

and free or low-cost ADR services

that courts can expand significantly

the percentage of cases to which the courts,

in alliance with the bar,

deliver valuable service.

ADR services are free in my court's program.

****

Let's shift our focus to issues related to serving as neutrals in court sponsored ADR programs.

We Need to Be Mindful of the Implications of the Context in Which We Serve

When we serve in different contexts there may be different sources of role-defining norms:

When we serve as a mediator in a purely private setting

in some measure, the parties' values and goals should be sources of norms guiding how we play our roles as neutrals,

Whereas, when we serve as a neutral in a court sponsored ADR program

the values and goals that dominate the judicial system are the sources of the controlling norms.

What are the principal values and goals that guide our service in court programs?

What is our principal goal when we host ADR events in a court program?

A. To get as many cases as possible settled?

B. To accelerate the timing of settlements?

C. To leave the parties and lawyers feeling that we have provided them a valuable service, or at least that we really have tried to be helpful to them?

D. To encourage the parties to feel respect for the integrity of the judicial institution and the processes that institution sponsors.

While the sources of controlling norms may be different, at least in part, when we are working in the public and in private settings, I have a strong suspicion

(1) that there is **not** as much difference as we might at first assume between

what "works" in mediations in the public sector and

what "works" in mediations in the private sector –

and

(2) that **"integrity of process"** often is as important

to "success" in private sector mediations

as it is in mediations sponsored by the courts.

One of the theories that supports this hope runs as follows:

> As a general proposition, the more confidence the parties have in the integrity of the process, the more confidence they are likely to feel
>
> > that the process has produced an **analysis** that is as **reliable** as possible, and that
> >
> > the process has **identified** accurately **what terms** of settlement **might be accessible** –
>
> and confidence about these matters might be the single most significant contributor to achieving settlement.

III. What Are Some of the Most Significant Sources of Peril in Our Quest to Maintain Integrity of Process?

> ***Exaggerating***
>
> > ***our responsibility,***
> >
> > ***our ability, and***
> >
> > ***our contribution.***

A. Exaggerating Our Responsibility *– to get the case settled.*

I assume that most of us have had some version of the following kinds of thoughts:

"I've got to get this case settled.

That's what they hired me for – or

that's what the court expects from me.

So, to earn my money, or

to prove (again) that I am good at this job,

that I am not a fake who has no business being in this business, and

that I deserve to exist,

I've got to get this case settled."

Similarly, I'm sure that all of us have heard mediators or settlement judges say things like:

I settled that case, or

I hope you settled that case for me.

While it may be natural and understandable to think in these kinds of terms, it also is dangerous.

No mediator ever settled a case.
No judge ever settled a case.
Parties, and only parties, settle cases.

Because the neutral does not have the **power** to settle the case, the neutral also does not have **responsibility** to settle the case.

When we assume too much responsibility for the outcome or productivity of our mediations,

➜ we put role-distorting pressure on ourselves,

as we will be tempted to push, to manipulate, to cut process corners in order to get a deal,

➜ we unnecessarily increase our stress, our fatigue, our disappointment, and our feelings of failure and incompetence,

and,

➜ we violate the spirit of mediation,

whose **purposes** include

(1) freeing parties from disabling dependencies **and**

(2) encouraging *parties* to assume direct **responsibility** for

➢ understanding their situation

(in the litigation and outside it),

➢ generating or identifying the full range of possible solution options, and

➢ deciding which course to follow.

B. Exaggerating Our Ability

● *A form of vanity*
whose effect is to
make us feel superior to and
to separate us from those we are trying to serve;

Participants can feel that artificial separation – and will find nothing in it to respect.

● *In exaggerating our ability we likely are assuming, perhaps not fully consciously, that we can understand the parties better than they can understand themselves, that we can identify what is best for them, and that we can manipulate them toward that 'resolution' that we have identified for them.*

● *When we exaggerate our ability we assume we can find techniques or devices to get the deal done –*

and when we go searching for such devices we divert our attention away from the people and their experience of the process – and

when we can't find magic devices we feel frustrated and anxious.

C. Exaggerating Our Contribution

Do we neutrals tend to over-estimate what our work achieves?

Are our assessments of what we achieve more generous than the assessments of the lawyers and litigants whom we are trying to serve?

Data from Northern District Questionnaires

➤ Did the mediation process help the parties identify underlying interests, needs and priorities beyond their legal positions?

Parties: not asked.

Attorneys: 67% yes.

Mediators: 88% yes

➤ Did the parties explore resolutions that the court could not order?

Parties: not asked (presumably don't know limits on what court could order)

Attorneys: 32%.

Mediators: 47%

➤ Did the mediation help the parties bridge a communication gap?

Parties: 22%

Attorneys: 19%

Mediators: 47%

➤ Were the issues clarified or narrowed?

Parties: not asked.

Attorneys: 35%.

Mediators: 71%

There ***RAND*** study (6 districts, data from 1992-93) disclosed a similar systematic difference between perceptions and views by the neutrals, on the one hand, and, on the other, by the lawyers and clients.

For example:

The percentage of neutrals who reported overall satisfaction with the ADR process was about 20% greater than the percentage of lawyers or clients who reported overall satisfaction.

Similarly, the percentage of neutrals who reported that the ADR process had positive effects by

(1) narrowing differences between the parties,

(2) reducing need for discovery,

(3) reducing time to disposition, and

(4) improving the relationship between the parties

was consistently higher, by margins in the **20%** range, than the percentage of lawyers and litigants who reported such positive effects.

What accounts for these differences?

?? Are the mediators engaging in wishful and self-congratulatory thinking?

??? Or are the parties and lawyers simply not perceiving what is actually happening?

Is their understanding insufficiently subtle and discriminating?

I'm not sure –

maybe the differences in views are attributable in some measure to both of these factors.

But I am concerned that if we exaggerate how much we have contributed in the past, we may subject ourselves to unrealistic and counter-productive expectations.

We risk adopting misleading and demoralizing standards for assessing **"our" "performance"** in this role.

And, perhaps most dangerously, we **slip into thinking that what we are doing is "performing."**

Slipping into a mode of "performing" might be the greatest source of peril to how well we serve in our mediator roles

because there is growing evidence that the attributes that lawyers and parties believe make mediators most effective sound in things like trust, genuineness, honesty, and empathy.

III. What is the key to being really good as a settlement facilitator?

The verb in this sentence should not be "is".

The verb form should be plural.

Moreover, I believe there are no tricks.

There are no secret techniques that will convert you into a settlement sorcerer.

There is no such thing as a settlement sorcerer.

Which characteristics of a mediator are most important to his or her success?

Professor Stephen Goldberg's study.

Secrets of Successful (and Unsuccessful) Mediators
by Stephen Goldberg & Margaret Shaw
October 2007 issue of the Negotiation Journal

Survey of lawyers (mostly) and others who had participated in mediations hosted by a select group of highly regarded mediators.

Attributes cited most frequently as most important to mediators' effectiveness

Generalization: Respondents viewed ***"confidence building attributes"*** as appreciably more important to mediator effectiveness than either "process skills" or "evaluative skills."

"Confidence-building attributes":

Friendly, empathetic, likable, relates to all, respectful, conveys sense of caring, wants to find solutions 60%

High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional 53%

Smart, quick-study, educates self on dispute, well-prepared, knows contract/law 47%

"Process skills"

Patient, persistent, never quits 35%

[all others cited less often; most by a considerable margin]

"Evaluative skills"

Does useful reality testing regarding legal/contractual weaknesses, evaluates likely outcome in court/arbitration, candid regarding same 33%

Study Three: survey of same people who responded in Study Two, but this time they were asked:

> if they had ever participated in a mediation in which they felt that the mediator had engaged in **counter-productive conduct** that **reduced the likelihood of settlement** and, if so, to identify any such conduct.

By a considerable margin, the attributes cited most often as the reason a mediator's work was **unsatisfactory and ineffective** were

> **"Lack of confidence-building attributes"** [or, 'attributes that undermine confidence']
>
> > ***Lack of integrity***, not neutral,
> > disclosed confidential information,
> > failed to accurately convey position,
> > inconsistent evaluations,
> > interested in settlement at all costs,
> > too quick to reach conclusions 48%
>
> Among the other attributes identified frequently as reasons for a mediator's ineffectiveness were
>
> > lacking energy or firmness,
> > just going through the motions,
> > just delivering messages 24%
> >
> > self-absorption, not listening, and
> > not being respectful or empathetic 20%

There is indirect support for these propositions in the findings of another recent study:

SUBJECTIVE VALUE IN *NEGOTIATION*

An empirical study of what people value when they negotiate

by
Jared Curhan and Heng Xu of MIT and Hilary Elfenbein of UC Berkeley
2008 – draft

Subjective value can serve as a good in itself.

The authors point out that other recently reported research suggests that participants in negotiations often choose to forfeit or limit opportunities that they otherwise would have to extract value from the other party to the negotiations, either consciously or unconsciously, in order to preserve their internal self-esteem **or** their sense of themselves as being fair in the way they treat others.

This study by Curhan, Xu, and Elfenbein included, among other things, asking a large group of respondents to rank what was important to them in negotiations they had recently completed.

The respondents rated several subjective factors as high in relative importance to them as they rated factors that reflected objective negotiation outcomes.

Among the findings: **greater subjective value experienced in one negotiation predicted greater subsequent willingness to engage in cooperative interactions with the same counterpart.**

Willingness to work cooperatively in the future with a counterpart in negotiation

varied with subjective value

but did *not* vary with objective outcome.

✶✶ ***This data suggests that how one is treated during the negotiation process,***

with how much respect and apparent honesty and fairness,

has a bigger and longer lasting impact on willingness to cooperate with a counterpart in the future

than did the degree of satisfaction with objective outcome.

Before learning about these studies,
I conceptualized in similar ways
the qualities of mediators or the aspects of their approach
that I thought were most important to parties.

Genuineness,

Honesty,

Trust,

Transparency & Inclusiveness.

Genuineness: by which I mean things like:

Giving a lot of ourselves – caring – putting a lot of energy into the process.

Connecting with the parties *by really listening* to them

Suspending our need to control and interrupt;

Suspending our need to show off; and

Suspending our relentless impulse to judge.

One perhaps heretical way to think about this aspect of genuineness is to suggest that when we are serving as mediators the center of our attention should not be on process, but on people – each individual human being who is participating.

This occurred to me when I was thinking about how I have responded to the spiritual fatigue that I have sometimes felt.

I realized that when I have shifted my focus from process to persons, i.e.,
when I have focused on the individual human beings with whom I am meeting,
and when I have really tried to "enter" their situations,
their stresses and dilemmas,
my energy has returned.

This return of energy may be a by-product of shifting my emotional attention away from myself and my circumstances (e.g., boredom) and toward other people, their circumstances and needs.

So ***one way to "unlock"*** **our energy may be to "*lock in*" in on others**.

Is it risky to shift our attention away from process and toward persons?

Isn't 'process' the center of mediation?

Or are we learning that the **center** of mediation is authenticity –

and that focusing on persons,

instead of being pre-occupied with process,

may be critical to authenticity?

Another key ingredient of "genuineness" (as I use that term here) is

Being honest.

➪ **About what we don't know and our other limitations,**

➪ **About the strengths of a party's position (especially in private caucus),**

➪ **About our values and sympathies, if relevant.**

Another dimension of genuineness is *Being Ourselves.*

Not manipulating ourselves into "playing a role."

Being natural, not theatrical.

To be oneself, it is helpful to know oneself.

It is especially important to understand oneself emotionally – to know

➜ what kinds of behaviors or attitudes push our buttons,

➜ what kinds of values we hold most dear and to whose protection we are most likely to leap.

➜ what kinds of circumstances make us tense -- or rachet up our levels of stress – and to understand how we tend to react to stress.

The word "trust" captures much of the spirit of this message:

It can help us keep our focus on the main chance if we remind ourselves

that one of our most important ends --

and one of our most valuable means --

is to earn and build trust ---

or at least to try to reduce the distrust and

the pre-occupation with self-protection

that seem to accompany so many people who participate in our legal system.

<u>What we are teaching or modeling</u>

is a fundamental premise of the mediation movement – and

of many other movements with similar spiritual roots:

That, in many more settings than people think,

***the means/end dichotomy is <u>false</u>*;**

That the means are the end.

IV. Transparency and Inclusiveness – key tools in the trust-building business

A. Transparency About Ourselves – (as discussed above).

B. Transparency About Our Process --

and the reasons or theory that support our process recommendations.

Example: explaining at the outset that one of my goals is to reduce the risk of false failure

1. social error,

2. analytical error,

3. process error, e.g., painting oneself into a face corner,

4. mis-guessing about what terms might be accessible,

5. giving up prematurely.

C. Inclusiveness: Including the Parties in Making Important Process Choices

At the outset, and at each major fork in the road, bring parties into decisions about which process path to follow.

Ask for their suggestions – and ask them what they see as the pros and cons of each process option.

Two assumptions underlie and inform much of my thinking in these arenas:

I believe that

(a) by being transparent about ourselves and the processes we host,

and

(b) by inviting the parties and lawyers to participate in making process decisions:

➜ **[1]** we **communicate respect** for the parties,

and

➜ **[2] respect is one of the most liberating and energizing forces** in human interaction.

There is **one variety of transparency** that may be under-utilized

the shorthand title I use: **"name it and explain it."**

When you are concerned about something before or during a mediation that could compromise the potential of the process,

(1) articulate directly to the parties what that concern is:

"name it" –

(2) then explain how that behavior or attitude or circumstance could impair the parties' ability to maximize what the mediation could do for them.

(b) The "name it and explain it" process can

(1) *help the parties become more self aware*, and

(2) *help them understand better the effect on the process that a position or approach is having or could have*, and

(3) *pull the parties into the process of finding ways to overcome a problem* –

converting them from source of problem to source of solution – and, in the process,

energizing their participation in the mediation.

A suggestion for how to phrase this kind of input:

> "I have encountered this situation in other mediations I have hosted, and
> I have seen it play out along the following lines:"

VII. Your success rate can be 100%.

When you serve as a neutral in a court's ADR program, it is the values at the core of the court that we use to measure your success.

Measured by those values, you "succeed" in every mediation in which

you treat others with respect and

host a process whose integrity deserves their respect in return.

ENE

Invention:

Mid-1980's;

By a Task Force of lawyers, from a wide variety of practices,

appointed by our then Chief Judge, Robert F. Peckham,

who wanted us to search for ways to reduce the cost of taking a civil case through the court system.

I. How the lawyers on the Task Force went about inventing ENE

A. The lawyers identified the principal sources of **unnecessary** cost and delay.

See the handout entitled "Problems ENE Can Address."

Note that the driving purposes of ENE are to improve the traditional litigation process – not to displace it.

ENE was designed to supplement and complement the case management efforts of the judges and the lawyers –

to improve the efficiency and enhance the rationality of the litigation process.

ENE also was designed to:

> (a) reduce party alienation from the litigation process (don't understand, don't participate, have no power), and
>
> (b) tap clients as sources of economic discipline and common sense – both in the litigation process and in settlement negotiations.

B. After identifying sources of unnecessary cost and delay, the Task Force lawyers designed a **process** that would provide litigants with **tools to attack** those sources.

ENE was designed to be an externally imposed event that,

relatively early in the pretrial period, would

force the parties to communicate,

to do their core investigative homework,

to assess their situations in the litigation, and

to compare the pros and cons of the various paths ahead.

II. What is the ENE process?

See the **handout** entitled "Essentials of the ENE Process."

The Neutral Host:

✶ case-specific **subject matter expertise**;

✶ at least 15 years of law practice;

✶ trained by the court in how to conduct an ENE session and how to host mediations.

III. **Our experience with ENE**: lawyer and party assessments.

See Rosenberg and Folberg, Alternative Dispute Resolution: An Empirical Analysis, 46 Stanford Law Review1487 (July 1994).

See Assessments of ENE: **see two pages of handouts**.

Purposes/benefits: In addition to cutting cost and delay:

(a) ENE can **enhance the quality of justice by**:

(1) expanding the parties' information base,

(2) improving their analyses (of law and of likely inferences from the evidence), and

(3) sharpening the joinder of issues

(b) Help **promote settlement**:

About 30% of the cases settle at the ENE session,

but

62% of the lawyers report that ENE enhanced prospects for settlement.

IV. **Case-specific Factors Favoring and Disfavoring Referral to ENE**

See handout.

V. **ENE/Mediation: joint sessions v. private caucuses**

(a) In ENE, parties/lawyers can have more confidence in the integrity of and bases for the neutral's evaluative input than in mediation that has included private caucusing –

> because everyone gets to see everything that goes into the evaluator's mind from the other side before the evaluator forms her evaluation.

(b) in ENE, all parties can be confident that they are receiving the same evaluative inputs from the neutral – because they all hear the same thing at the same time.

(c) ENE can deliver more value to case development planning

(d) ENE guarantees that each party and lawyer will have direct access to the lawyer and litigant on the other side (not access filtered by a mediator) –

> ENE – or joint sessions in mediation – give each participant opportunities to speak directly to and assess participants on the other side, or
>
> to display directly to the other side the sympathy or persuasive power a client or key witness will generate.

(e) If one or more of the litigants needs something like her day in court –

or something akin to a "judgment" (e.g., for a sense of vindication) –

but also wants an opportunity to pursue settlement,

ENE can be more attractive than either non-binding arbitration or mediation (at least in many of its forms).

IS PROCESS PLURALISM AN ILLUSION?

HOW EVALUATIVE IS OR SHOULD MEDIATION BE?

Real process pluralism, i.e., maintaining distinctive process integrities, is possible, but difficult.

Maintaining predictable process distinctions is especially difficult in a program that operates under one umbrella label of "mediation."

In our mediations, there is considerable variability in the extent and character of evaluative input –

but we seem to be in comfortable sync with our local legal culture.

Data from participants in our mediation program:

How evaluative was the mediation process?

1. Did the mediator give an **overall evaluation** of likely outcome or settlement value?

Parties: 42% yes.

Attorneys:

30% = likely outcome;

26% = settlement value.

Mediators: 24% yes (I gave my opinion about settlement value).

2. Rating the degree of evaluative assertiveness by the mediator with respect to the parties' legal positions on a SCALE OF 1-5 (five being most evaluative):

Parties: not asked.

Attorneys: (least to most evaluative):

9 17 33 25 12 (4% = not discussed)

Mediators: (least to most evaluative):

11 22 34 26 8

ROLE OF THE MEDIATOR RE PRESSURE TO SETTLE?

[theme: mediators in sub-cultural sync]

Rating the mediator on a scale of 1 - 5,

one being the mediator "**wasn't sufficiently forceful**" and

five being the mediator "**applied too much pressure**":

Parties:

9	14	63	11	2

Attorneys:

13	13	60	11	3

APPROACHES TO THE IMPASSE PROBLEM

I.
Appreciating the Context in Which We Serve

Is impasse always bad? No.

Does impasse represent failure? Not necessarily – and if it does reflect a 'failure,' that 'failure' is not necessarily the neutral's.

Given our role and responsibilities in a **court sponsored program**, **how should we "frame" our objective with respect to impasse**?

It is NOT our job or responsibility to "break" impasse

[we shouldn't be trying to "break" anything]; and

mis-assuming that it is our job to "break" impasse can tempt us to use inappropriate techniques.(to try to pressure or manipulate parties into movement).

We need to remind ourselves that we may contribute a great deal toward the ultimate settlement of the case, and/or to other important benefits the parties get out of the mediation/evaluation process, even when the parties fail to achieve a settlement in the process we host.

Many times, our mediation or ENE session will jump start **or** form the foundation for a settlement process that the parties complete on their own after our work with them.

We also need to recognize that it is common for parties not to reach agreement in the first mediation session – even if it is a long, labor-intensive affair – but that we will be able to help them achieve a settlement with appropriate follow-up after the first major session.

Such follow-up can range from brief phone conversations or emails through second and third full-scale mediations.

We also should acknowledge that some parties may self-consciously conceive of a mediation not as the occasion to reach a settlement, but as a tool to demonstrate strength and resolve to an opponent [to 'soften up' the other side], to probe for possible terms, and/or to set the stage for negotiations that will occur sometime after the mediation has been completed.

So, when we are serving in a court program, how should we frame our task/responsibility with respect to apparent impasse?

It is to help the parties

explore and understand the sources and character of their impasse **and** to

help them determine whether their apparent impasse is real and not reversible.

What is the most important determinant of our ability to perform this service:

how much the parties trust and respect us;

how genuine our interest in helping them is.

II.
"MANAGING" THE ADR PROCESS AND HANDLING OUR ROLE TO REDUCE THE RISK OF PREMATURE IMPASSE

One of our tasks is to try to "manage" the ADR process so that impasse does not occur –

or at least so that if impasse surfaces, it does so only at the end of a long, careful process.

The focus of this section: Tools or techniques to reduce the risk of premature or false impasse

Remember: it is very common for mediators to encounter "apparent" or "false" impasse;

Some variety of impasse is likely to surface in a substantial percentage of mediations – sometimes several times.

So we must not be surprised or thrown off-balance when this happens.

Rather, we need, as an initial instinct, to recognize at least the first apparent "impasse" as nothing more than a natural part of the process – and then to continue our process in an appropriate, constructive way.

Some Tools for reducing the risk of premature or false impasse:

Integrating themes: Transparency and Inclusiveness.

I. Counseling the participants

A key to helping participants avoid premature or unnecessary impasse is to ***counsel them*** at the beginning of and throughout the session about

mistakes you have seen others make and about

approaches or steps or moves that are most likely to improve prospects for productive negotiations.

A. Counsel parties (in joint session or in caucus) about real listening and constructive communication.

One way to counsel the participants indirectly is to explain the part of your role that revolves around **reducing the risk of false failure**.

Some of the reasons for false failure:

1. social error – insensitive or pugnacious remarks
2. analytical error
3. miss-guessing what terms might be accessible
4. shortfall in tenacity
5. process error, e.g., painting oneself into a face corner
6. participants permitting "competitiveness" to displace judgment. Sometimes lawyers or clients convert the settlement dynamic into a competition instead of a search for what is best for the clients.

B. Counsel parties about the viscera or dynamics of negotiations generally; e.g., each person's need to achieve something, the parties' need to preserve options, to justify movement, to save face, etc.

Try to manage the process so that one party does not make substantially larger concessions at any given point than the other party.
Try to preserve a sense (in all the parties) of roughly equal reciprocity of movement/concessions.

C. Before negotiations become too emotionally dense, consider meeting privately with one lawyer at a time, e.g., to identify areas of special client sensitivity or subterranean problems or agendas.

D. As the process develops, help the parties assess their informational situation, i.e., help them determine what they need to know, inside and outside the litigation, in order to make responsible negotiation decisions.

Help parties determine whether there are informational gaps that would make it unwise to make an offer or demand at this time, or to take a rigid settlement position?

E. Counsel parties **not** to rush to the numbers.

F. Counsel parties about making their **first (opening) offer or demand; both substantive factors and timing**.

➢ Make sure parties identify all the elements or components of a settlement demand that really are important to them the first time they make an offer or demand –

to avoid a last minute effort to add an important condition or element that could cause resentment and impasse.

Remind parties about **factors** they might want to consider

when deciding what their **opening** offer/demand should be:

1. **Do not open with a number that is outside the range of plausibility**.

a. Reduces the credibility you need during the negotiations – especially when your client really has bottomed out.

b. Makes you seem foolish, unwise, greedy, and/or inexperienced.

c. Gives your opponent no incentive to negotiate – or to respect you or to take you seriously – can even cause so much anger that it kills the negotiations at the start.

d. Might encourage false hopes in your client.

2. Select a number that is within the range that you can explain on the basis of the evidence and law;

root your number in reasoning about the merits –

unless some external factor, that you identify, must control your client's settlement position.

Never underestimate the power of fairness.

3. Do not open with your client's real bottom line.

a. Sucks the viscera out of the process.

b. Likely to be seen by opponent as you throwing down a gauntlet – as you making a challenge that requires a comparably aggressive counter-attack.

c. Leaves no room for other party/lawyer to achieve something through the negotiations.

d. Leaves you with nothing to trade to help your opponent justify movement he might want to make, or might be willing to make.

e. Suggests that you have nothing to learn – and leaves you no room to move if you learn something significant.

4. Do not open with a number your opponent already has emphatically rejected (at least unless you acknowledge that rejection).

5. Consider what the likelihood is that your opening number might "anchor" the negotiations in a favorable zone.

6. How informationally mature is the case?

Less mature = more distance ok between opening number and place you are likely to end up.

7. How protracted are the negotiations likely to be?

8. How do opposing counsel and client go about negotiating?

- ➢ straight-forward? impatient with gaming?
- ➢ gamer?
- ➢ distrustful, paranoid, fearful?

9. In what range is your opponent's opening figure likely to fall?

Approximate parity of movement (en route to final figure) tends to feel fair, lubricate the process.

But don't permit your figure to appear to be entirely reactive – keep it rooted in the case or in identified situation-specific circumstances.

10. How great is your opponent's need to "win" – or to feel that she has achieved something significant through the negotiations?

11. What are your strengths and weaknesses as a negotiator?

If not vulnerable to pressure, need less room.

12. What is your reputation as a negotiator? or What do you want your reputation as a negotiator to be?

If you have a widely-known reputation as a negotiator, it can be risky and misleading to your opponent to deviate from behavior that your opponent expects.

13. What level of experience/expertise does your opponent have with this kind of case and with the settlement value of and the settlement dynamics in this kind of case?

14. What level of experience/expertise in this kind of case does your neutral (judge, mediator) have?

15. With what degree of certainty can the damages be measured?

16. Do not pick a number that is right on an emotionally or symbolically significant plateau.

95 can seem a lot different from 100.

G. Counsel parties about issues related to or fears of **"bidding against myself"**

Consider using secret offers/demands to overcome this source of resistance.

Reassure a reluctant party that you would not be exploring the possibility that she would make a move if you did not think that her opponent was likely to be open to making a move.

H. Counsel parties about **"slippery slope"** issues in negotiations

Reassure parties that they have the independence to avoid slippery slopes and that their lawyers are fully competent to protect them from making an unwise decision that is supported only by momentum.

Also reassure the parties that you will not pressure them to make any moves or changes of position.

I. ***Remind parties that a key to settlement is to make an offer or demand that makes it difficult for the other side to walk away***.

A party who wants to reach a settlement cannot make proposals that the other side can dismiss without feeling that they might be making a mistake, without worrying that if they reject your proposal they (or people to whom they report) might later regret the decision.

II. Handling Your Own Conduct [as the neutral] to reduce risk of premature or false failure (impasse).

A. Articulate your views of the merits in ways that do as little damage as possible to

the parties' sensibilities and

your ability to help the parties in settlement negotiations.

Preserve their respect by being respectful (visibly).

Remind the parties,
by the way you form and express your views,
how analytically fragile litigation can be –

how difficult predicting outcomes is, how many variables can come into play in at least partially unforeseen ways.

B. **Never state or imply your views about the merits** (even some part of the merits) **early** in the process.

Wait until you have learned everything you can – including what everyone else's views of the merits are.

Some evaluators prepare parts of an evaluation before the session; if you do so, **limit your outline to identifying issues and** setting forth **legal principles** and citations; fill in the substance after the session.

C. Be careful about how you ask or frame questions. Remember:

the form of a question can imply a substantive view, or

appear to be implicitly accusatory, or

feel like cross-examination animated by alignment with the opposing party [frame Qs in true spirit of direct exam].

1. It's almost always best to ask questions in the open-ended, non-leading form.

2. Try to preface questions by saying, explicitly, that you are asking in order to improve your understanding or to gather information that the parties already have.

Make sure you imply that the cause of the confusion is your own limitations;

do not imply that the source of your confusion is incompetent or deceitful communication by the person to whom you pose the question.

"Please, help me catch up with you. . . . ."

Be respectful of the lawyers – not condescending or judgmental.

3. Don't ask questions that seem analytically (or emotionally or morally) aggressive or abrupt.

Don't be competitive with the lawyers (or anyone else) – e.g., ***don't "compete" for center stage, or 'control,' or for analytical or experiential superiority***.

4. Don't ask questions to show off what you know or how smart you are or how well you understand the case.

D. Even as an "evaluator," <u>don't be afraid to say "I don't know</u>."

1. Don't feel that it is your "duty" always to have an opinion; sometimes there just isn't a sufficient basis for an opinion.

You may feel pressure to have an opinion or to know something because you are supposed to be an "expert" and you are supposed to be experienced and wise.

But don't permit any party or lawyer to pressure or bully you into forming or expressing an opinion if you really don't have one,
or if you are very unsure about the bases for it.

It can **enhance your credibility** to admit in a straightforward way that you don't know something or aren't at all sure about something.

2. If you have an opinion that you cannot explain or justify (by reasoning), you should say something like:

I don't really have an opinion about that – or

I don't have any opinion that I could support about that, or

I have only an "infirm instinct" about that – nothing that anyone should put any real stock in.

In this situation, it might be wise to try to figure out why you can't explain the opinion – or at least try to identify what is informing your "infirm instinct" (you might discover that what is informing your instinct is only bias of some kind – or an assumption you are importing from some quite different setting).

E. Appropriately qualify and limit your assessments of the merits,

as a matter of honesty, and

to preserve (if appropriate) room to adjust your views, or to help the parties justify making changes in their positions.

1. Be sure to **identify very clearly what you are assessing** or what you are expressing an opinion about.

Do not assume that clients will understand what piece or component of the case you are assessing – or even that you are offering an assessment.

2. Never over-state your conviction about your opinion and never purport to be 'positive' or '100% sure' about your opinion on a contested issue.

Do not use phrases like "findings of fact" or "conclusions of law."
Do not purport to be articulating "findings" about anything.

Do not say or write things like "the evidence clearly establishes that . . . ." or "on the evidence, the facts are . . . ."

3. If you would need additional information to assess some aspect of the case, identify that information specifically.

And explain why you feel you need the particular additional information – what role it would play in your analysis/assessment.

4. If the content of your opinion about something is contingent on something else, identify what that contingency or condition is.

For example, you might say:

➢ "If the jury were to resolve factual dispute X in a specific direction, then I think 'Y' would likely [or more likely] follow. [then explain why]

OR

➢ "If independent witness X were to testify along the following lines, then I think 'Y' would more likely follow." [then explain why]

5. If you offer an opinion about the whole case, and if your opinion includes a monetary value, make sure you distinguish between

(1) **judgment value** and

(2) **settlement value**.

Of these two, what is contemplated in the ENE process is a "judgment value."

If what you articulate is a "judgment value" (explicitly so identified), you will leave yourself room, as a settlement facilitator, to express a different view about what the settlement value of the case might be.

6. When you express an opinion:

Remind the participants that you are not passing judgment on anyone.

Instead, you are simply trying to help the parties predict the factual inferences from the evidence that seem most likely to be drawn by a jury or judge.

Emphasize tangible evidence and

which inferences the structure of the situation and the usual operation of incentives seem most likely to support.

III.
WHAT TO DO
IF THE PARTIES SEEM TO BE AT AN IMPASSE

First, beware of concluding too quickly that apparent impasse is real.

Don't simply take at face value a party's statement that it's "best" or "final" offer is "X."

Begin by trying to *identify the source* (or sources) of the impasse.

A. Different sources of impasse are likely to **call for different techniques or approaches**.

B. Involve the parties directly and openly in the process of identifying the sources of the impasse.

Encourage ownership of and buy-in to the process

by asking the parties to lead the effort to identify the source of the problem and

to *decide what process steps to take* to address the problem.

Openly and actively involving the parties in this process communicates that the mediation is the parties' process, not the court's or the neutrals –
that ***it is their interest in making it work that is at stake, not the court's***.

C. **If the parties and lawyers have not been able to identify the sources of their impasse, and if you think you know** what the source of the apparent impasse is, ***consider naming it and explaining it*** – gently – as part of a transparency of approach that can encourage trust.

> But don't just announce that you "know" what the "problem" is; instead, say something like:
>
> "I've seen parties in this kind of situation in other cases, and it turned out that what was getting in the way of further progress was [. . X . . .]. Do you think that factor is at play at all here?"

D. Some of the many possible sources of impasse:

- Is the source <u>informational</u>?

- Is the source <u>analytical</u>?

> Is the source a significant difference between the parties in apparently sincerely held views about what the relevant law is, or about what the evidence will be or how it will be interpreted?
>
> **➢ Is a source of the difference between the views or positions of the parties something that the evaluator or mediator has articulated or intimated?**

- Is the source excessive posturing (e.g., trying to intimidate or trick an opponent into accepting unfavorable terms), or gambling, or some lawyer or client in some other way trying to game the process?

- Is the source of impasse emotional or interpersonal?

  Lawyers or clients who don't like one another?

  The egos or the competitiveness of lawyers or parties or both?

  A lawyer and her client who don't like one another?

  If the source is emotional, what is its form: anger, shame, fear, jealousy, revenge, etc.?

  Need to rebuild sense of self?

  Do participants need time to cool off, or

    to let proposals percolate, or

    to 'process' what has happened at the mediation,

    or to gain some perspective on and to acknowledge and accept (emotionally) what their alternative paths really consist of?

● Is the source some factor or situation that is external to the litigation?

(1) External business relationships or situations?

(2) Shelf life of a product?

(3) Time-value of money?

(4) Tax consequences?

(5) Somebody needing to protect their job or their record or their self-esteem?

(6) Implications of settling this case for other pending or feared cases (ripple effects to other litigation)?

Generalized fear of unpredictable consequences? or

Fear of effects of specific proposed terms of settlement, or

Fear of the consequences of the fact that the party agreed to settle?

(7) Some political pressure or consideration?

(8) Fear of public disclosure (embarrassment, etc.?) or criticism of terms or fact of settlement?

- Is the source of impasse fear by some participant in the process that someone who is not present (boss, partner, board, etc.) will second-guess and criticize the terms he or she accepted or recommended? Or will be unhappy that any settlement was reached (e.g., before the 'budget' the firm targeted for the case had been spent/earned?).

- Is the source the influence or views of some person or group who/that is not present, not participating directly in the negotiations or even the litigation?

- Is 'distrust' the source of impasse? Of whom? (maybe you)

    Is the source fear of being tricked or cheated or taken advantage of?

- Is the source simply fear of leaving something on the table, or fear that the other side will get the better of the deal, or a competitive person's fear of being "bested" in the negotiations?

- Is the source a greedy or over-reaching lawyer?

- Is the source advice by a lawyer that is clearly defective?

- Is the source lack of confidence by or in a lawyer?

  Inexperience? with this kind of case?

  Insufficient homework/understanding?

  Fear of malpractice/losing client?

- Is the source greed or over-reaching by a client?

- Is the source clearly unreasonable and unrealistic expectations by a client?

- Is the source lack of confidence, uncertainty, by the client:

  Lack of confidence in her own lawyer?

  Lack of confidence in her own judgment – or her power to decide?

- Is the source of impasse a party's fear that <u>he will feel diminished</u> by a settlement, a fear that a compromise would feel like or be seen by others as

  a failure (to attain or preserve everything), or

  an abandonment of principles, or

  a partial or oblique admission of fault?

We can help by giving the party information about other cases –

e.g., if the terms being offered by the defendant support us saying so,
we can reassure the plaintiff that defendants only offer these kinds of terms in cases they take very seriously – and that, within the legal world, no one would view a settlement on these terms as a failure or as reflecting any lack of conviction, commitment, or courage by a plaintiff.

- Is the source fatigue?

Are the parties too exhausted to think clearly and from a perspective that is consistent with their underlying interests?

Are they reluctant to move because they are aware that they are exhausted and are afraid that, in that state, they will make bad decisions, decisions they will regret later?

Has the process been focused for a sustained period on one kind of issue or problem or one kind of approach; do parties need a change of focus, or a distraction, or an emotional or analytical break?

E. SOME PROCESS *TOOLS* FOR ADDRESSING *IMPASSE*

Remember to try to pick tools that are tailored to the specific source of the impasse.

1. Ask parties in private caucus what they believe the source of the impasse is and to suggest ways to try to get past it. Why are we stuck?? What might we do to move forward?

Consider asking each side (in private caucus) to analyze the line of reasoning that supports its own settlement position and the settlement position of the other party;

[this kind of request can seem precious to some lawyers and repeat players; be prepared for resistance to this idea, especially if the mediation already has consumed a substantial amount of time].

Or, **ask each party to try to identify the issue or circumstance or consideration that seems to be playing the biggest role in separating the parties**.

Or, consider saying: Our process doesn't seem to be working very well; do you have any ideas about how we could get it back on track?

Or, **is there anything you might be able to do that might get us rolling again**?

2. **Should we try some other format or approach?**

Meet separately with counsel? With the parties? With one party or lawyer at a time? A group session, e.g., so parties can brain storm together, or make sure that each understands all the considerations affecting the other's approach to settlement?

3. Consider turning the negotiations over to the parties, directly, pulling the lawyers and maybe even the neutral out of the dynamic.

4. Should we involve some additional or new people in the process?

A boss? The senior partner? The CEO/CFO? Spouse? Friend? Partner? Carrier? Surety?

A lawyer or a substantive expert with a different background or perspective?

5. **If** the source of impasse is **informational or analytical, make a plan** to enable the parties to acquire the information they need.

For example:

a. take a key deposition or file a key motion,

b. acquire key documents (e.g., medical records), or

c. bring in a mutually acceptable neutral expert (could be an expert in a substantive discipline, an industry, or even a lawyer with deep experience in the relevant field) – to get a credible second opinion on a key issue or to conduct an investigation or tests and report findings.

Then schedule appropriate follow-up.

6. Could you give me [the mediator] some additional information or new arguments (case related or not) that I might use to help the other party rationalize or justify movement?

7. If the source of the impasse seems to be emotional or interpersonal:

a. Consider creating a safe (private caucus?) setting for the parties to give voice to their feelings – to try to vent and clear a path to move forward.

b. If appropriate, consider trying to persuade the litigants (and/or lawyers) to separate the process of searching for a solution to the problem from their negative feelings about the people.

Victoria Inchon, a mediator in Southern California with "Judicate West," invented the following approach to this situation in a dispute between neighboring property owners over mud-slide damage.

The principals disliked one another intensely and their emotions had interfered with their capacity to focus on other relevant things, including solution options.

Ms. Inchon put a cup in the center of the table and told everyone that the cup represented the problem.

Then she gave each participant in the mediation a penny.

She suggested that if each participant put his/her penny in the cup, that would help them focus on the problem and not be distracted by emotions.

When they wanted to know why they should put their pennies in the cup, Ms. Inchon told the participants:

"Whenever your focus shifts back to feelings, I'll jiggle the cup a little. I'm not suggesting you shouldn't say how you feel . . . . I'm just proposing that it would help all of us if we were aware of the moments when we're acting in response to emotion and when we're thinking about a business solution to an economic problem."

Somewhat reluctantly at first, each of the participants agreed to put his or her penny in the cup.

That act by itself – so reminiscent of grade school – broke a little of the interpersonal ice.

And setting up and explaining this little system served as a way to gently teach the participants what their emotions were doing to the process.

Setting up and explaining this system also distracted them for a few minutes from those emotions.

The system worked – as the participants were thereafter able to maintain a business perspective and to settle their case.

See Victoria Inchon, "When Talks Reach an Impasse, Mediators Work Their Magic," in the San Francisco Daily Journal, April 30, 2008, p. 6.

8. Are there any invisible issues in the litigation or in the dynamic between parties or counsel?

9. Is there an invisible agenda at work in this case?

10. **Offer** (in your role as a neutral) to **help** in situation-specific ways, e.g. to:

a. Help **draft** a critical paragraph (or to **resolve drafting disputes** if counsel reach a drafting impasse).

b. **Speak to persons whose support or approval is needed** (a meeting of a union or a board of directors).

c. **Conduct a mediation somewhere more convenient** for the parties – or more accessible to their constituents.

d. **Visit the site of a critical event or review important evidence.**

e. **Attend a sensitive deposition.**

f. **Approach a non-party** to seek its participation or cooperation, e.g., to provide information, to settle or remove a lien, to acknowledge insurance coverage, to grant a license or join a venture, etc.

Insurance carrier.
Hospital (or other health care provider).
Supplier.

11. How has being involved in this conflict/litigation affected you and your situation? The other parties and their situations?

What price (monetary and non-monetary) have you had to pay for being involved in this litigation? Have the other parties had to pay?

12. What would change (or what would be different for you or for other parties) if you reached an agreement?

13. Ask each party in private caucus: If the parties fail to reach an agreement, what is your vision of how this matter will play out?

Tell me as specifically as you can what the procedures are that will be followed and the actions that will be taken from here through the end of the litigation (including appeal)?

How long will these take and how much will they cost (you; other parties)?

Be sure to explain that you are not asking these questions in order to put pressure on anyone –
but because your job, as the neutral, is to help each party understand as clearly and specifically as possible
what each alternative course is likely to entail.

14. What will your situation be (broadly defined) if you lose at trial (and on appeal)?

15. Suggest non-monetary elements of settlement packages – including 'apologies', joint press releases, assistance finding a new job, joint ventures, consideration in kind, etc.

16. Identify things [outside the lawsuit] that the plaintiff might value that the defendant is in a position to deliver but that plaintiff could not acquire or accomplish on his own, or that defendant could deliver with less difficulty or at less cost.

17. Do the parties need to restructure deals/relationships for tax purposes? Consider structured pay-outs?

18. In multi-party cases, try to get a deal between any two of the parties – to create momentum and/or concern among the other parties that they might be left alone on their side of the case.

Find the most reasonable defendant or the most respected defense lawyer – and try to get a deal with that party.

19. Separate inventing from deciding: ask parties to invent or imagine as many different settlements of the dispute as possible, reassuring them that they are committing themselves to nothing in this process.

Or, in a variation on this theme, ask each party to identify 2 or 3 different possible settlement packages, again without commitment.

20. **Hypotheticals**:

✷ Based on how the case might play out:

➜ If the evidence were to be viewed as . . . . .

➜ If the judge were to rule in "X" way on a motion (e.g., for partial summary judgment, or a motion in limine, etc.) . . . .

✷ Based on what an opponent might do in the bargaining process:

➜ If the other side were to offer X or do Y, would you be willing to . . . . .

➜ Would you be willing to move by X if the other side also was willing to move by X?[1]

[1]Dwight Golann of Suffolk University is the source of the phraseology used here and in the next example question. See his forthcoming book and his article in Dispute Resolution Magazine (Spring 2009?).

➜ If the other side would agree, would you be willing to agree to have the rest of our bargaining fall within the range of X to Y (e.g., $100,000 to $200,000)?

➜ If you knew that you would never have to pay a dime more to your opponent in connection with this matter, would you be willing to offer "X"?

Remember: if you 'make up' a hypothetical offer to probe whether there are any circumstances in which one party might move,
make it very clear to the party to whom you are speaking that the opposing party is **not** the source of this offer and
has not intimated that it might be willing to make it.

And be very careful not to use in such a hypothetical offer terms that the other party is very unlikely to accept.

21. In California state courts, ask each party to make their **best Rule 998 offers/demand**.

In federal courts, ask defendant to make best Rule 68 offer.

Randall Kiser's research suggests that parties who go through the process of developing a 998 offer are less likely to make a settlement decision-error than parties who do not make such offers. [settlement decision error = turn down a settlement proposal then fail to do better at trial]

See Randall Kiser, et al., "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful

Settlement Negotiations," Cornell University's Journal of Empirical Legal Studies (September 2008).

22. Share with the parties other key findings of Randall Kiser's research into failed settlement negotiations:

➜ The ***incidence of settlement decision-error*** is appreciably higher for plaintiffs than for defendants (i.e., plaintiffs are more likely to make a settlement-decision error than defendants);

About 60% of the time plaintiffs fail to get a larger verdict at trial than the final settlement offer from defendant;

whereas **defendants** make settlement decision-errors only about **25% of the time**.

➜ But: the ***magnitude*** of the decision error is much greater for defendants than for plaintiffs;

The mean difference between last rejected settlement offer and verdict was about $43,000 for plaintiffs,

but that mean figure was about **$1.14 million for defendants**.

23. **Secret numbers**: known only to neutral.

Might use hypothetical bracketing to advance this technique;

e.g., tell each party that you are trying to help them determine whether they can get to a point where they are only $100,000 apart –
and ask each to make a secret offer/demand that has the best chance of getting the parties within $100,000 of one another.

24. The ***secret*** **conditional [or hypothetical] offer or demand**:

"Would you agree, in confidence with me, to offer 'X' but only on the condition that the other side agrees to X or some other condition in advance? I will keep your willingness to settle at X a secret unless and until I get the commitment from the other side to the condition you have specified."

"In strict confidence, would you tell me whether, if you knew that it would close the deal [if you had a firm commitment that it would close the deal], you might be willing to [pay or accept 'X']"

25. **Secret final** best offers/demands.

26. L.A.: defendant writes check to plaintiff and puts it on the table.

27. L.A.: defendant brings cash to the negotiations and puts it on

the table, telling the plaintiff that he can have the money right now if the parties settle the case.

28. As the **mediator, consider offering contained evaluative input or a different perspective:**

> ***If***, after the process has played out for quite a while, there is some aspect of the case or situation that you feel a party and lawyer (or the parties and lawyers on both sides) have not addressed adequately or accurately,
>
> > and you feel that you have some reliable input or a potentially useful perspective on the matter,
> >
> > you might tell a party and lawyer in private caucus (or all participants in a group session) that there is one aspect of the case or the parties' circumstances about which you have been thinking and
> >
> > ask if they would be interested in getting some input from you, or an opinion from you, about that matter.
>
> The parties/lawyers might well first ask you to identify the aspect of the case or circumstances that you have in mind.

If the parties/lawyers want to hear your input or opinion:

➢ explain that you are **NOT** offering this input to try to leverage anyone to change his or her position or to try to capitalize on risk aversion, but,

instead, in order to try to be helpful by providing a new perspective or a second opinion that the parties can take into account to whatever extent (including none) they choose;

➢ make sure you qualify appropriately any evaluative input you offer (e.g., identify its limitations or any assumptions on which it is based);

➢ don't articulate any input you offer as any kind of personal or final judgment.

29. **Mediator's number/proposal.**

This procedure can provide parties a way to save face, even if getting the deal requires them to move past their "bottom line" – because they can say that the number was the mediator's idea, not their own.

What the mediator says her number/proposal represents can be a sensitive matter, especially for mediators serving in a court program.

The ethically safest course probably is to cast our number as rooted in sociology,
not in judgment about the merits of the case:

> we can explain that, based on all of our experience and what we know about this particular case,
>
> our number represents **our best estimate of the number that is most likely to yield a settlement** –
>
> > i.e., the number that has the best chance of securing both parties' agreement.

It is **NOT** at all clear that it would be appropriate for a mediator
who is serving as a representative of a court
to suggest that her number is
what the settlement "ought" to be,
or the settlement that would be the **"fairest."**

On the other hand, if asked, it **probably is O.K**. for a mediator in a court program to indicate whether a number (or other terms) that a party is considering **feels 'fair'** – or feels like
'a fair basis' for disposition by agreement.

It would **NOT** be appropriate for a mediator serving under court sponsorship to **"beg" or "plead"** for movement or for acceptance of a proposal.

> And it would be **improper to suggest** that a party should change his settlement figure in order **to please the court**, or as **a favor** to the court, or as a special **concession of any kind to the mediator**, who, by hypothesis here, is serving as a representative of the court.

30. Advise parties to consider thinking in terms of **the sociology of the subculture in which they are working, the sociology of what is possible**;

> – perhaps using **comparator cases** to suggest that, in roughly parallel situations, cases just don't settle outside of 'range X.'

31. Identify external norms (e.g., voluntarily adopted industry standards) or facts that might influence the parties' feelings/thoughts about what terms would be fair.

> One variation on this theme is to describe the purposes of a statute or rule that is in play – and the kinds of problems or harms that it is designed to avoid or reduce –
>
> > to help a party understand why the law proscribes or prescribes certain kinds of acts or courses of conduct, even when they are not accompanied by any bad intent or fault.

Never forget the power of fairness.

32. **Take a break, let parties vent or percolate in private, perhaps go home for the day; <u>but don't give up</u>**.

Instead, <u>work with the parties</u> to agree on some kind of **<u>follow-up</u>**.

Examples:

a. Specifically scheduled emails or phone calls from counsel to you.

Reporting any new thoughts, results of further inquiries or consideration, new evidence or legal research, etc. Scheduled, not maybe.

b. Phone calls by you to counsel.

c. Exchanges of additional information between the parties, or scheduling some pretrial event or discovery process (perhaps we attend or help manage);

d. A follow-up ***"time-block mediation session"*** **by phone or email**;[2]

Ask the parties to set aside a fixed period (e.g., 9:00 a.m. until noon on a date certain) during which you will further explore settlement with them – perhaps in a group phone conference, perhaps in a series of private phone conversations or email exchanges.

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[2]Dwight Golann also is the source of this idea. See cites at footnote 1, <u>supra</u>.

The fixed period, with all participants available, can

create a crucible effect and

increase the odds that we will have timely access to the information and the decision-makers that we need.

33. Set a deadline.

Should you tell the parties that this will be your final effort to help them?

34. Last Best Offer **Arbitration**: get last, best offer from each side – then go to "Last Best Offer Arbitration" – where the arbitrator must pick either the last offer or the last demand (no other options).

35. **Bifurcate**: settle some parts of the case and let the parties either litigate or arbitrate others (or address the remaining parts in some other form of ADR).

This approach might be especially attractive in fee-shifting cases (settle the damages; litigate [by motion] the attorneys' fees).

In some cases the parties might ask the mediator to take on the role of "czar" (final power; no appeal) for certain purposes or to resolve certain issues.

V.
Timing of Referrals to ADR:

A. <u>Decisions about timing</u> should be informed, at least in part, by <u>what the principal purposes of the referral are</u> –

or what the principal benefits are that the parties hope to secure through ADR.

B. <u>Involving the parties in a discussion about timing</u> can

1. Teach them about the many benefits (in addition to settlement) that ADR sessions can deliver;

2. Make them feel more invested in the process, and

3. Remove some excuses for not preparing adequately.

C. <u>Consider using</u> **ADR** in **<u>two-stages</u>**:

The <u>first stage</u> consists of either

- ➢ a shorter, less elaborate mediation, or
- ➢ a "limited-purpose case management meeting"

that the mediator hosts for counsel (and, sometimes, the parties).

The principal purpose of the first event is to try to

identify what the parties need to do to maximize the value of a full ADR session and to

develop a plan to meet those needs before the full session is held.

D. **Circumstances that *favor* *early* referral to ADR**.

(1) The complaint includes many causes of action/claims and/or the answer includes many affirmative defenses – and it is not clear (to the litigants) where the center of the case is or which of the claims or defenses are most significant.

(2) There is a significant disproportion between litigation transaction costs and the realistic value of the case and the only relief being sought is monetary.

(3) Pertinent law is well-established and the key evidence can be developed relatively quickly from known sources.

(4) There is a well-developed "sociology of valuation" for this type of case and the injuries have stabilized.

(5) Liability is fairly likely and a prevailing plaintiff would be entitled to attorney's fees.

(6) Litigants have strong incentives to end the dispute relatively soon and to move on –

> e.g., the parties are business entities that will have a continuing relationship or
> that have substantial incentives to form a relationship.

(7) The lawyers on both sides are deeply experienced with this kind of case and

> know enough about what the evidence is likely to be
>
> to be able to advise their clients responsibly about settlement.

(8) The outcome is likely to turn on the court's ruling on a legal issue

> that has significant long-range implications for at least one of the parties and
>
> that party wants to avoid a ruling on that issue in this case.

E. **Circumstances** that ***disfavor*** an ***early*** referral:

1. Case is informationally immature but might have substantial value.

E.g., damages could be sizeable but the parties have not yet developed the damages evidence, perhaps because injuries are serious but have not stabilized or because expert reports about damages are needed.

2. Delaying disposition clearly is in one party's best interest – so that party has no incentive to resolve the case soon.

3. Liability turns on subtle or complex evidence, or inferences from evidence, and

whether or not there is liability is extremely important to one or both sides (e.g., a "bet the company" patent or trade secret case).

4. The parties disagree sharply about a question of law that is critical to outcome or settlement – and

neither side is afraid to take the risk of getting an unfavorable ruling on that legal question.

5. Little time has passed since the events giving rise to the case occurred or since the accusations in the pleadings were first made and emotions clearly will remain too raw for constructive dialogue across party lines for a while [don't accept at face value every such assertion, and remind parties that mediation can help them work through strong emotions].